U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
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[redacted]

PUBLIC COPY

File: EAC 99 089 50677 Office: Vermont Service Center Date: FEB 14 2000

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(H)(i)(b)

IN BEHALF OF PETITIONER: [redacted]

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Terrance M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the director of the Vermont Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner, a computer software development and consulting firm established in 1998, seeks to employ the beneficiary for three years as a senior software engineer in the H-1B classification for specialty occupations. The director requested further evidence and the petitioner responded on March 1, 1999 (I-797 response). In a decision of April 10, 1999, the director determined that the proffered position did not qualify as a specialty occupation and that the petition did not establish that the beneficiary would perform services in the position or in a specialty occupation. The petitioner appealed on May 3, 1999 (appeal), submitting more information.

Provisions of § 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(H)(i)(b), accord nonimmigrant classification to qualified aliens who are coming temporarily to the United States to perform services in a specialty occupation. The definition in § 214(i)(1) of the Act, 8 U.S.C. 1184(i)(1), describes a "specialty occupation" as one which requires theoretical and practical application of a body of highly specialized knowledge and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Regulations in 8 C.F.R. 214.2(h)(4)(ii) define the term specialty occupation as:

> an occupation which requires theoretical and practical application of a body of highly specialized knowledge to fully perform the occupation in such fields of human endeavor, including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

The specialty occupation itself must meet one of the criteria of 8 C.F.R. 214.2(h)(4)(iii)(A):

> *1.* A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

2. The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;

3. The employer normally requires a degree or its equivalent for the position; or

4. The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

The petition described for the beneficiary the position of senior software consultant. In contradiction, a letter of April 27, 1999, introduced on appeal, revealed that its author, a third party, was offering the position. The third party, as an importing employer, has made no petition such as the statute requires. See § 214(c)(1) of the Act, 8 U.S.C. 214(c)(1). Its client, a fourth party, kept the right to dismiss the beneficiary without payment if it was dissatisfied with his performance in the first two weeks. The employer has the power to hire, fire, supervise, or otherwise control the beneficiary's work. 8 C.F.R. 214.2(h)(4)(ii).

The record confused the identity of the importing employer, whether the petitioner, the third party, or the fourth party. Though the petitioner's and beneficiary's contract or oral agreement must accompany the petition, none clarified the capacity of the petitioner as the employer. 8 C.F.R. 214.2(h)(4)(iv)(B). If the petitioner claimed to be the importing employer, it did not submit the requisite itinerary for the multiple locations it proposed. 8 C.F.R. 214.2(h)(2)(i)(B).

The petitioner provided data on the proffered position,

> Our clients include large companies as well as small companies, both governmental and private. We are involved in very exciting technologies such as user interfaces, databases, real-time software, imaging and networking. We can help companies set new Internet sites and help in day to day maintenance....
>
> The beneficiary has been offered full time temporary employment in the position of Senior Software Engineer. The job duties will involve architecting large corporate systems running on IBM mainframes utilizing DB2, CICS, MVS, JAVA, TCP/IP, and Internet gateway. The beneficiary will also investigate and recommend client server intranet systems that integrate with mainframe Legacy

> systems. There will also be requirement from time to time to help in y2K remediation efforts....

The transmittal of the I-797 response explained,

> [The petitioner] was formed in July 1998 with the purpose of providing consultancy services in the computing industry. We also develop software for businesses. Currently we are in the process of launching a web site that will provide a repository for mainframe legacy documentation. For this and to satisfy the demands from our clients, we are in the process of hiring [the beneficiary].

The data confirmed that the beneficiary would perform services in positions with other employers and under contracts which are not between such employers and him. No importing employer has made a petition, as required. Each must file a petition, but none has. 8 C.F.R. 214.2(h)(2)(i)(C). The reviewer can not determine whether they involve services in the realm of a specified specialty occupation.

The record supported the director's conclusion that the petition did not prove a proffered position in a specialty occupation. Consequently, these proceedings need not decide whether the petitioner's income was enough to evidence its capacity as an importing employer for the beneficiary. In passing, the petition acknowledged one employee and claimed, during three to four months of operations, gross income of $250,000 and net of $100,000.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.